(13) (16)

Nos. 95-345 and 95-346

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

UNITED STATES OF AMERICA,

Petitioner,

v.

GUY JEROME URSERY,

Respondent.

UNITED STATES OF AMERICA,

Petitioner,

v.

FOUR HUNDRED AND FIVE THOUSAND, EIGHTY-NINE DOLLARS AND TWENTY-THREE CENTS ($405,089.23) IN UNITED STATES CURRENCY, *ET AL.*,

Respondent.

On Writs of Certiorari to
the United States Courts of Appeals
for the Sixth and Ninth Circuits

BRIEF AMICUS CURIAE OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS IN SUPPORT OF RESPONDENTS

RICHARD J. TROBERMAN*
1301 Fifth Avenue, Suite 3500
Seattle, WA 98101-2650
(206) 343-1111

*Counsel of Record for
Amicus Curiae
National Association of
Criminal Defense Lawyers

[Additional Counsel Listed On Inside Cover]

Balmar Legal Publishing Department, Washington, D.C. (202) 682-6800

37 pp

DAVID B. SMITH
526 King Street, Suite 213
Alexandria, VA 22314-3163
(703) 548-8911

PROF. BROOKS R. FUDENBERG
Univ. of Miami School of Law
Coral Gables. FL 33124-4662
(305) 284-4262

TAMARA R. PIETY
100 NE 3rd Ave, Suite 900
Ft. Lauderdale, FL 33301
(305) 523-0400

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INTEREST OF THE AMICUS [1]

The National Association of Criminal Defense Lawyers ("NACDL") is a District of Columbia non-profit corporation

[1] All parties have consented to the filing of this brief pursuant to Rule 37.3 of the Rules of this Court.

with a membership of more than 9,000 attorneys and 30,000 affiliate members, including representatives from every state. The American Bar Association awards NACDL full representation in its House of Delegates.

NACDL was founded over thirty-five years ago to ensure justice and due process for persons accused of crime; to foster the integrity, independence and expertise of the criminal defense profession; and to promote the proper and fair administration of criminal justice.

NACDL has long been troubled by the expanding use of civil forfeiture proceedings in our criminal justice system. We have deep concerns about the fairness of some of these laws and the aggressive way they are used by state and federal prosecutors to inflict punishment and to deprive individuals of significant property interests, often without any of the constitutional and procedural protections generally accorded to either criminal or civil defendants.

In its past several terms, this Court has reviewed a substantial number of forfeiture cases. In its decisions, the Court has endeavored to establish legal safeguards to appropriately restrain the government's increasingly aggressive use of the forfeiture weapon. The cases at bar provide the Court with an opportunity to correct what has become a pervasive government practice: advancing the policies of criminal prosecution through civil forfeitures. Thus, NACDL has a vital interest in the outcome of these cases, and urges the Court to affirm the decisions below.

SUMMARY OF ARGUMENT

The Double Jeopardy Clause protects against three distinct abuses: (1) a second prosecution for the same offense after acquittal; (2) a second prosecution for the same offense after conviction; and (3) multiple punishments (and attempts to punish) for the same offense. *United States v. Halper*, 109 S.Ct. 1892 (1989). A civil as well as criminal sanction constitutes punishment when the sanction as applied in the individual case serves the goals of punishment. *Id.* at 448. For double jeopardy analysis, the order of punishment does not make a difference.

The government's argument that the civil forfeiture statutes in the cases at bar do not constitute punishment for double jeopardy purposes is built on a false dichotomy, and is inconsistent with prior decisions of this Court. *Austin v. United States*, 113 S.Ct. 2801 (1993).

Among the relevant inquiries for double jeopardy purposes is whether the government's conduct constitutes oppression of the sort against which the Double Jeopardy Clause was intended to protect. Despite the importance of private property as a "concomitant to liberty," few proceedings in our judicial system are more oppressive than a civil forfeiture proceeding, especially when that proceeding occurs while the possibility, or actuality, of a criminal prosecution based upon the same violation looms. The government enjoys tremendous strategic and procedural advantages in such situations. For example, people are often forced to defend against civil forfeiture without benefit of counsel, either because they were indigent to begin with, or because the government has rendered them indigent through seizure of their assets. Thus, claimants are often left in the procedural posture of defending against the government with one, if not both, hand(s) tied behind their back.

By requiring the government to seek imprisonment, fines and forfeitures in one proceeding, the decisions below promote both fairness and judicial efficiency. The government already has this ability in most cases through the use of criminal forfeiture statutes.

ARGUMENT

I. THE PROTECTION OF PRIVATE PROPERTY RIGHTS IS CENTRAL TO OUR HERITAGE.

In order to analyze and decide the issues presented in these consolidated appeals, the Court must first examine the nature of the rights at stake. In determining whether forfeiture of property is punitive, and whether the Double Jeopardy Clause protects against multiple attempts to punish for the same violation of law through both criminal prosecution and forfeiture of property in separate proceedings, a brief review of the importance of property rights in our society is indispensable to a resolution of the issues before the Court.

Throughout the history of western democratic societies, the importance of private property as a "concomitant to liberty" has been widely recognized. "The Fifth Amendment embodies the Lockean belief that liberty and the right to possess property are an interwoven whole; neither life, liberty, nor property can be arbitrarily or capriciously denied us by government." *United States v. $12,390.00*, 956 F.2d 801, 810 (8th Cir. 1992) (Beam, J., dissenting in part). *See* John Locke, THE SECOND TREATISE ON CIVIL GOVERNMENT, ¶¶ 123-42.[2] Indeed, this Court has recognized that "a fundamental interdependence exists between the personal right to liberty

[2] The Founders understood that private property was a fundamental aspect of personal liberty and, moreover, a major goal of the Revolution itself. In the Declaration of Independence, Jefferson, borrowing from John Locke, asserted that the goals of the nation were "life, liberty, and the pursuit of happiness." Locke's language, of course, had been "life, liberty, and property." Jefferson rightly understood that property was a part of both liberty and the fundamental happiness of the people. The demand for a Bill of Rights naturally included the demand for the protection of property, which the Founders regarded as "the guardian of every other right." James W. Ely, Jr., THE GUARDIAN OF EVERY OTHER RIGHT: THE CONSTITUTIONAL HISTORY OF PROPERTY RIGHTS (1992).

and the personal right in property. Neither could have meaning without the other." *Lynch v. Household Finance Corp.*, 405 U.S. 538, 552, 31 L.Ed.2d 424, 92 S.Ct. 1113 (1972); Likewise, as recently observed by this Court, "[i]ndividual freedom finds tangible expression in property rights." *United States v. James Daniel Good Real Property*, 114 S.Ct. 492, 505 (1993).

The nature and quality of a citizen's freedom and security relates directly to his or her ability to own property and to be secure from governmental intrusion therein. "[I]n a free government almost all other rights would become worthless if the government possessed power over the private fortune of every citizen." *Chicago, Burlington & Quincy R.R. v. Chicago,* 166 U.S. 226, 236, 41 L.Ed. 979, 17 S.Ct. 581 (1897); *see also* Charles A. Reich, *The New Property,* 73 YALE L.J. 733, 771-74 (1964) (asserting that a person's freedom and security depend on his ability to protect his property from irrational government interference); Leonard W. Levy, ORIGINAL INTENT AND THE FRAMERS' CONSTITUTION, 276-77 (1988).

II. THE DOUBLE JEOPARDY CLAUSE PROTECTS AGAINST MULTIPLE PUNISHMENTS AS WELL AS SUCCESSIVE PROSECUTIONS.

It has long been held that the Double Jeopardy Clause of the federal constitution protects against three distinct abuses: (1) a second prosecution for the same offense after acquittal; (2) a second prosecution for the same offense after conviction; and (3) multiple punishments for the same offense.[3] *Ex Parte Lange,* 18 Wall. 163, 168, 21 L.Ed. 872 (1873) ("If there is

[3] The Double Jeopardy Clause protects not only against multiple punishments, but also--perhaps especially--against multiple *attempts* to punish ("[n]or shall one be twice put in jeopardy.") *See, Witte v. United States,* 115 S.Ct. 2199, 2205 (1995).

anything settled in the jurisprudence of England and America, it is that no man can be twice lawfully punished for the same offense"). *See also, North Carolina v. Pearce,* 395 U.S. 711, 727, 23 L.Ed.2d 656, 89 S.Ct. 2072 (1969) (Douglas, J., dissenting) ("The theory of Double Jeopardy is that a person need run the gantlet only once. The gantlet is the risk of punishment which the State or Federal Government imposes for that particular conduct."); *United States v. Halper,* 490 U.S. 435, 104 L.Ed.2d 487, 109 S.Ct. 1892 (1989); *Dept. of Revenue of Montana v. Kurth Ranch,* 511 U.S. ___, 128 L.Ed.2d 767, 114 S.Ct. 1937 (1994).

The underlying idea is that the government, with all its resources and power, should not be allowed to make repeated attempts to punish an individual for the same offense, thereby subjecting an individual "to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity." *Green v. United States*, 355 U.S. 184, 187-88, 2 L.Ed.2d 199, 78 S.Ct. 547 (1971). "The right not to be placed in jeopardy more than once for the same offense is a vital safeguard in our society, one that was dearly won and one that should continue to be highly valued." *Id.* at 198.

Thus, despite recent concerns expressed by some members of the Court,[4] the protection against multiple punishments "has deep roots in our history and jurisprudence," *Halper, supra,* 490 U.S. at 440, and is "too firmly fixed in the punitive and remedial jurisprudence of the country to be now displaced." *See, e.g., Bennis v. Michigan,* ___ S.Ct. ___, ___, 1996 WL 88269 at *7 (1996), quoting) *J.W. Goldsmith, Jr.-Grant Co. v. United States*, 254 U.S. 505, 511, 65 L.Ed.2d

[4] *See, Kurth Ranch, supra,* 114 S.Ct. at 1955-59 (Scalia, J., joined by Thomas, J., dissenting); *Witte, supra,* 115 S.Ct. at 2209-10 (1995) (Scalia, J., joined by Thomas, J., concurring).

376, 41 S.Ct. 189 (1921 (discussing another long-standing principle).

Apparently recognizing that this Court is not likely to overrule *Halper*, the government attempts to severely narrow *Halper's* holding by arguing that the protection against multiple punishments can arise only after a criminal prosecution. The government's argument is devoid of merit. Nothing in *Halper* suggests such a narrow interpretation. *Halper* framed "the sole issue before it" as "whether the statutory penalty authorized by the civil False Claims Act, under which Halper is subject to liability of $130,000 for false claims amounting to $585, constitutes a second 'punishment' for the purpose of double jeopardy analysis." *Halper*, 490 U.S. at 441. Similarly, the Court observed that "[t]he notion of punishment, as we commonly understand it, cuts across the division between the civil and the criminal law, and for the purpose of assessing whether a given sanction constitutes multiple punishment barred by the Double Jeopardy Clause, we must follow the notion where it leads. . . . Simply put, a civil as well as criminal sanction constitutes punishment when the sanction as applied in the individual case serves the goals of punishment." *Id.*, at 448.

The government's argument rests, at bottom, on a single sentence in the *Halper* opinion: "We therefore hold that under the Double Jeopardy Clause, a defendant who has already been punished *in a criminal prosecution* may not be subjected to an additional civil sanction to the extent that the second sanction may not fairly be characterized as remedial, but only as a deterrent or retribution." *Halper*, at 448-49 (emphasis supplied). That sentence, however, merely identifies the factual context of the case before the Court. There is no discussion or analysis anywhere in the Court's opinion of the need for a prior criminal prosecution to trigger double jeopardy analysis. Indeed, the Court did not limit its holding

only to punishments which follow criminal prosecutions, and even left open the notion that double jeopardy could bar multiple *civil* punishments: "Nothing in today's ruling precludes the Government from seeking the full civil penalty against a defendant who previously has not been *punished* for the same conduct, even if the civil sanction imposed is punitive." *Id.*, at 450. Significantly, the Court did not equate punishment with criminal prosecution. Rather, it squarely rejected that analogy. *Id.* at 448.

The government's assertion that the order of proceedings should make any constitutional difference is not based on reasoning or analysis, but merely the government's hope that *Halper* can be narrowly limited to its facts. However, every circuit court has recognized that there is no principled basis for so limiting *Halper's* double jeopardy reasoning. Common sense dictates that regardless of the order of the civil and criminal proceedings, the Double Jeopardy Clause will bar the second sanction if both the first and the second sanctions are deemed punishment. As recently observed by Justice Scalia, "[i]f there is a constitutional prohibition on multiple punishments, the order of punishment cannot possibly make any difference." *Kurth Ranch, supra,* 14 S.Ct. at 1957 (Scalia, J., dissenting), citing *United States v. Sanchez-Escareno,* 950 F.2d 193, 200 (5th Cir. 1991), *cert. denied,* 113 S.Ct. 123 (1992).[5]

Nevertheless, the government presses its argument that for double jeopardy purposes, it is irrelevant how severely a person is punished so long as that punishment is meted out

[5] *See also, United States v. Morgan,* 51 F.3d 1105 (2nd Cir. 1995); *United States v. Williams,* 56 F.3d 63 (4th Cir. 1995); *United States v. Tilley,* 18 F.3d 295, 298, n. 5 (5th Cir. 1994); *United States v. Austin,* 54 F.3d 394, 399 (7th Cir. 1995); *United States v. Bizzell,* 921 F.2d 263, 267 (10th Cir. 1990); *United States v. Meyers,* 897 F.2d 1126, 1127 (11th Cir. 1990), *cert. denied,* 498 U.S. 865 (1990).

prior to a criminal prosecution. But *Halper* itself provides the clearest example of why the order of punishment cannot possibly make any difference. Under the government's reasoning, the government would have been free to exact the full measure of the civil penalty against Halper (more than $130,000 based upon Halper's overcharges in the sum of $535) *and* criminally prosecute him for the same conduct without running afoul of the Double Jeopardy Clause, so long as the civil penalty preceded the criminal prosecution. This cannot be right. Indeed, as discussed, infra at pp. 23-26, being subjected to a civil forfeiture proceeding *prior* to a criminal prosecution can be even more oppressive than the reverse.

III. CIVIL FORFEITURES PURSUANT TO 21 U.S.C. §881 CONSTITUTE PUNISHMENT.

A civil statute inflicting a monetary penalty can be sufficiently punitive that its use against a citizen operates as a bar to subsequent governmental attempts to punish.[6] Moreover,

[6] In *Halper,* this Court held that a civil sanction constituting punishment may not be imposed following a criminal prosecution based on the same offense without contravening double jeopardy protection against multiple punishments. The Court then turned to the question of whether, and under what circumstances, a civil penalty may constitute punishment for the purpose of the Double Jeopardy Clause. Rejecting the argument that only proceedings which are essentially criminal can result in punishment, the Court held that whether a nominally civil sanction is sufficiently punitive cannot be determined solely by statutory interpretation. The Court observed that "the labels 'criminal' and 'civil' are not of paramount importance," 490 U.S. 447, and concluded:

> [I]t follows from these premises that a civil sanction that cannot fairly be said solely to serve a remedial purpose, but rather can only be explained as also serving either a retributive or

this Court has previously held that at least some of the civil forfeiture statutes at issue here (21 U.S.C. §881(a)(4) and (a)(7)) constitute punishment.[7]

> In light of the historical understanding of forfeiture as punishment, the clear focus of §§881(a)(4) and (a)(7) on the culpability of the owner, and the evidence that Congress understood those provisions as serving to deter and to punish, we cannot conclude that forfeiture under §§881(a)(4) and (a)(7) serves solely a remedial purpose. We therefore conclude that forfeiture under these provisions constitutes payment to a sovereign as punishment for some offense.

Austin v. United States, 509 U.S. ___, 125 L.Ed.2d 488, 113 S.Ct. 2801, 2812 (1993). Every federal circuit court of appeal to have considered the issue, post *Austin*, has agreed that these statutes impose punishment for purposes of double jeopardy analysis.[8]

The government's argument that the civil forfeiture statutes in the cases at bar did not constitute punishment for double jeopardy purposes is built on a false dichotomy, and is inconsistent with prior decisions of this Court. First, the

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> deterrent purposes, is punishment, as we have come to understand the term.

490 U.S. at 448.

[7] We also agree with Respondents Arlt and Wren, for the reasons expressed in their brief, that forfeitures pursuant to 21 U.S.C. §881(a)(6) and 18 U.S.C. §981(a)(1) constitute punishment.

[8] In addition to the Sixth and Ninth Circuits in the cases at bar, *see United States v. Baird*, 63 F.3d 1213 (3rd Cir. 1995), *cert. denied*, 116 S.Ct. 909 (1996); *United States v. Perez*, 70 F.3d 345 (5th Cir. 1995); *United States v. Torres*, 28 F.3d 1463 (7th Cir), *cert. denied*, 115 S.Ct. 669 (1994); *United States v. 9844 S. Titan Court*, ___ F.3d ___, 1996 WL 49002 (10th Cir. 1996).

government repeatedly refers not to civil forfeiture statutes, but to statutes that are pervasively punitive or solely remedial. Second, the government argues that it is only in "a rare case" that a forfeiture would constitute punishment. In *Austin*, however, this Court applied *Halper's* reasoning to a forfeiture case involving a typical drug trafficking offense rather than a small-gauge money-penalty.[9] *See*, generally, S. Cox, *Halper's Continuing Double Jeopardy Implications: A Thorn By Any Other Name Would Prick As Deep*, 39 ST. LOUIS UNIV. L.J. 1235, 1249-50 (March 1996). As Professor Cox observes, "If anything, the *Austin* Court seemed to indicate that presumptions in favor of *upholding* a civil penalty as a non-punishment would more likely apply in the fixed-penalty context rather than in other situations." *Ibid.* Indeed, distinguishing civil forfeiture statutes from the fixed-penalty provisions in *Halper*, this Court in *Austin* observed:

> In *Halper*, we focused on "the sanction as applied in the individual case. . . In this case, however, it makes sense to focus on [the forfeiture statute] as a whole. *Halper* involved a small, fixed-penalty provision, which in the ordinary case . . . can be said to do no more than make the government whole." The value of the conveyances and real property forfeitable under Sections 881(a)(4) and (a)(7), on the other hand, can vary so dramatically that any relationship between the Government's actual costs and the amount of the sanction is merely coincidental.

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[9] This Court in *Austin* emphasized the following language from *Halper* in rejecting government claims that forfeiture's remedial purposes meant it could not be considered punishment: "[A] civil sanction that cannot be fairly said *solely* to serve a remedial purpose , but rather can only be explained as also serving either retributive or deterrent purposes, is punishment, as we have come to understand the term." 113 S.Ct. at 2812 (emphasis added in *Austin*) (quoting *Halper*, 490 U.S. at 448).

Austin, 113 S.Ct. at 2812, n.14 (citations omitted) (quoting *Halper*, 490 U.S. at 448, 449). *See*, Nancy J. King, *Portioning Punishment: Constitutional Limits on Successive and Excessive Penalties*, 144 U. PA. L. REV. 101 (1995).

The government's argument completely ignores *Austin's* finding that civil forfeiture is highly punitive (unlike graduated civil money penalties).[10] Moreover, the government mistakenly equates fines cases with forfeiture cases ("The holding of *Halper* requires a case-by-case inquiry into the character of the actual sanctions imposed in a particular case as a prerequisite for multiple punishments protection." Pet. Brief at 13). However, what *Halper* held was much narrower than that. *Halper* held that where a statute is designed to estimate liquidated damages, it will be the rare case in which sanctions applied pursuant to the statute do not approximate liquidated damages.[11] Conversely, where, as here, the statutes

[10] We agree that the government is entitled to bring truly remedial actions in addition to criminal penalties. Moreover, given the difficulty of accurately measuring the government's loss from a given act, there can be some leeway. As this Court noted in *Halper*, at 446, "the Government . . . may demand compensation according to somewhat imprecise formulas, such as liquidated damages or a fixed sum plus double damages . . ." Thus, when the government makes a good-faith effort to estimate, by statute, the likely harms of the forbidden act, this Court is hesitant to find the effort suspect. But where, as here, the statutes *do not even attempt* to weigh the amount of the property owner's loss against the value of the harm the property owner caused (or is likely to cause), such a claim is without credibility. Such statutes can only be justified on the grounds that the property owner's conduct deserves to be punished.

[11] The Court's holding follows necessarily from the premise: if reasonable liquidated damages are not punitive, then a statute seeking fines in the nature of liquidated damages will not generally be punitive. It will only be in the rare case, as in *Halper,* where a large number of small infractions are each penalized with fines amounting, in total, to almost 250 times the value of the government's loss, that an individual is punished by the operation of such fines.

are *not* designed to estimate liquidated damages, it will not be "the rare case" in which one is placed in jeopardy of punishment pursuant to the statutes. *See*, King, *Portioning Punishment*, *supra*, at 171 ("For instance, it made sense for the Court in *Halper* to compare the sanction there to the government loss -- the penalty provisions of the False Claims Act were calibrated to actual losses caused by the defendant's culpable acts. But other sanctions, like those in *Austin*, are set without reference to government loss.").

As the Court in *Austin* observed, it would not be "fair" to characterize 21 U.S.C. §881(a)(4) and (a)(7), providing for forfeiture of conveyances and real estate that have "facilitated" narcotics activity, as serving a remedial purpose. *Austin,* 113 S.Ct. at 2812 and n.14. A judge or prosecutor cannot strip punishment of its punitive character simply by offering an after-the-fact accounting of the government's costs of investigating and prosecuting crime that arguably justify a particular penalty under the statute, because the test is one of legislative purpose as well as punitive effect.[12] Accordingly, the Court in *Austin* correctly refused to compare the value of the Austins' forfeited assets with the government's costs in order to determine whether the forfeiture was punishment. Just as a criminal fine does not become remedial simply because its amount happens to resemble government losses, the forfeiture of an asset under a punitive statute does

[12] The government does not dispute the importance of the purpose of the statute. "Under . . . *Halper*, the issue whether a particular civil sanction amounts to 'punishment' within the meaning of the Double Jeopardy Clause turns on an analysis of the sanction's purpose. 490 U.S. at 448." Pet. Brief at 37. Nevertheless, the government concedes that civil forfeiture statutes were intended to have a "powerful deterrent" purpose, Pet. Brief at 43, n.11, citing *Austin's* reference to the legislative history of the drug forfeiture statutes. 113 S.Ct. at 2811 (quoting S. Rep. No. 225, 98th Cong., 1st Sess. 195 (1983)).

not cease to be punishment just because it happens to roughly equal the government's costs of detection and enforcement.

The government seeks to create a false dichotomy based on only two classes of cases: those which trigger the full panoply of criminal law protections, and those which receive no protections at all. Thus, the government argues, if a law is sufficiently penal to trigger double jeopardy protection, it must also trigger all other criminal protections.[13] But as this Court's holdings make clear, that is not the case.[14] Together, *Halper* and *Austin* create a *three* tiered hierarchy of civil sanctions: (1) sanctions that are not punitive, which require only the safeguards typically afforded to civil litigants; (2) punitive civil sanctions, which trigger constitutional limits on the multiplicity and severity of punishment; and (3) sanctions

[13] The government's assertion that the tax imposed in *Kurth Ranch* "may be best understood as falling into the long line of decisions, including *Mitchell, Mendoza-Martinez* and *Ward,* that have considered whether a civil statute is so inherently punitive in nature that the safeguards applicable to criminal prosecutions must be applied" (Pet. Brief at 34) illustrates the fallacy of the government's argument. *Halper* rejected the *Kennedy-Ward* all-or-nothing approach to civil proceedings. "The unstated but important *Halper* implication is that to pretend that punishment is not administered in civil proceedings would eventually strain common sense and the concomitant credibility upon which our legal system must ultimately rest for support of the rightness of its pronouncements." Cox, *Halper's Continuing Double Jeopardy Implications, supra,* at 1247. Under Professor Cox's reading of *Halper*, the whole point of rejecting the *Kennedy-Ward* analysis for civil punishments is to make clear that civil proceedings which punish can trigger some constitutional protections without triggering all the constitutional protections associated with purely criminal prosecutions. *Id.* at 1248, n.9. Clearly, the Court did not hold that Montana's administrative drug tax proceeding triggered such constitutional protections.

[14] *See, Austin,* 113 S.Ct. at 2805 ("Thus, the question is not, as the United States would have it, whether forfeiture under §§881(a)(4) and (a)(7) is civil or criminal, but rather whether it is punishment.").

that are essentially criminal, which activate all constitutional rights normally associated with criminal cases.

In *Kurth Ranch,* the Court followed the same categorical approach it followed in *Austin.* Six members of the Court explicitly agreed that *Halper's* fact-dependent method of determining whether the exaction is remedial or punitive "simply does not work in the case of a tax statute." *Kurth Ranch,* 114 S.Ct. at 1948 (Rehnquist, C.J., dissenting).

Only Justice O'Connor would have followed *Halper's* fact-dependent approach. 114 S.Ct. at 1952-55 (O'Connor, J., dissenting). Justice O'Connor observed that the Ninth Circuit had recognized that imposition of the drug tax on the Kurths' possession of marijuana would not be punishment if the sanction bore some rational relationship to "the staggering costs associated with fighting drug abuse in this country." 114 S.Ct. at 1954 (quoting *In re Kurth Ranch,* 986 F.2d 1308, 1312 (9th Cir. 1993)). Justice O'Connor stated her view that *Halper* requires that

> the defendant must first show the absence of a rational relationship between the amount of the sanction and the government's nonpunitive objectives. The burden then shifts to the government to justify the sanction with reference to the particular case.

114 S.Ct. at 1954.[15]

[15] *Supra* at Professor King (*Portioning Punishment, supra,* 176-77) observes:

> "Under Justice O'Connor's test in *Kurth Ranch,* the amount of government loss caused by any given wrong can be manipulated with so little effort that almost any sanction, it seems, can be explained as compensation. The test would classify as rough remedial justice any civil award against any defendant involved in drug activity, as long as the award does not exceed the defendant's fair share of not only the state's drug en-

This Court's rejection of the *Halper* case-by-case approach in *Austin* and *Kurth Ranch* is eminently logical. As Chief Justice Rehnquist explains, the case-by-case approach was adopted in *Halper*

> because compensation for the Government's loss is the avowed purpose of a civil penalty statute. But here we are confronted with a tax statute, and the purpose of a tax statute is not to recover the costs incurred by the Government for bringing someone to book for some violation of law, but is instead to either raise revenue, deter conduct, or both. Thus, despite Justice O'Connor's attempt to view this case through the *Halper* lens . . . the reasoning quite properly employed in *Halper* to decide whether the exaction was remedial or punitive simply does not work in the case of a tax statute.

Kurth Ranch, 114 S.Ct. at 1949-50 (citations omitted) (Rehnquist, C.J., dissenting). The Court majority adopted

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forcement budget (past, present, and future) but also drug abuse education, deterrence, and treatment expenses. The State of Montana in its brief to the Court in *Kurth Ranch* noted that one study estimated that in 1980 that 'the total direct and indirect costs of drugs on society was almost 47 billion dollars.' It would be hard to come up with a dollar limit over which any drug-related forfeiture, tax, or other sanction becomes punitive under this theory.

Compensable harm must be limited to that caused by the defendant's particular conduct, not by the actions of others. A broad definition of harm that includes harm from others like the defendant, and foreseeable as well as actual harm, makes sense if the sanction was meant to *deter* conduct; deterrence looks forward, toward expected harm from all future violators. Conversely, compensation faces back in time and is actor-specific."

Chief Justice Rehnquist's reasoning on this point. 114 S.Ct. at 1948.

Like a tax statute, the purpose of a forfeiture statute is not to recover the "actual damages" or the costs incurred by the government as a result of the defendant's conduct. *Kurth Ranch,* 114 S.Ct. at 1948. Rather, the purpose of most forfeiture statutes, including the ones involved in these cases, is first and foremost *punishment*, *i.e.,* deterrence and retribution. *Austin, supra*; *Calero-Toledo v. Pearson Yacht Leasing Co.,* 416 U.S. 663, 686-87, 40 L.Ed.2d 452, 94 S.Ct. 2080 (1974) (forfeiture serves "punitive and deterrent purposes" and "impos[es] an economic penalty").

The government also complains that the appellate courts' categorical approach deprives it of any opportunity to prove the magnitude of the losses it suffered from the claimants' drug trafficking activity. But the government suffers no "losses" or damages from drug activity -- at least not in the same sense that it suffers a loss or actual damages when a contractor cheats the government. It is true that drug trafficking imposes enormous costs on society as a whole and that the Government spends billions of dollars on law enforcement and anti-drug programs. But those general social and governmental costs cannot be rationally accounted for in assessing whether a particular forfeiture imposes punishment. *Kurth Ranch,* 114 S.Ct at 1948; *Austin*, 113 S.Ct. at 2812 n.14 ("any relationship between the government's actual costs and the amount of the sanction is merely coincidental").

In the final analysis, the government's argument that forfeiture serves remedial purposes is undermined by the government's own words. As this Court recently observed in *James Daniel Good Real Property, supra,* the government "has a direct pecuniary interest in the outcome of [forfeiture] proceeding[s]." 114 S.Ct. at 502. The Court further observed

The extent of the Government's financial stake in drug forfeiture is apparent from a 1990 memo in which the Attorney General urged United States Attorneys to increase the volume of forfeitures in order to meet the Department of Justice's annual budget target:

"We must significantly increase production to reach our budget target.

". . . Failure to achieve the $470 million projection would expose the Department's forfeiture program to criticism and undermine confidence in our budget projections. Every effort must be made to increase forfeiture income during the remaining three months of [fiscal year] 1990." Executive Office for U.S. Attorneys, U.S. Department of Justice, 38 U.S. Attorney's Bulletin, 180 (Aug. 15, 1990).

Id., 114 S.Ct. at 502, n.2. It should thus be clear to all that the government regards asset forfeiture as a substantial revenue enhancement program, not a remedial policy.

IV. A CIVIL FORFEITURE PROCEEDING HAS ALL OF THE OPPRESSIVE ASPECTS OF A CRIMINAL PROSECUTION, BUT AFFORDS FEW OF THE CONSTITUTIONAL PROTECTIONS.

The government concedes that "[t]he relevant inquiry [for double jeopardy purposes] is whether the government's conduct 'constitute[s] governmental oppression of the sort against which the Double Jeopardy Clause was intended to protect,' " Pet. Brief at 57-58 (internal quotation marks omitted). Few proceedings in our judicial system are more oppressive than a civil forfeiture proceeding,[16] especially

[16] The abuse of civil forfeiture laws, and the concomitant destruction of private property rights, has been well documented in both scholarly and popular publications. *See, e.g.*, Hon. Henry J. Hyde, FORFEITING OUR PROPERTY RIGHTS: IS YOUR PROPERTY SAFE FROM SEIZURE?, CATO Institute (1995); Leonard L. Levy, A LICENSE TO STEAL, THE FORFEITURE OF PROPERTY, University of North Carolina Press (1996); T. Piety, *Scorched Earth: How the Expansion of Civil Forfeiture Doctrine Has Laid Waste to Due Process*, 45 U. MIAMI L.REV. 911 (1991); Mary M. Cheh, *Constitutional Limits on Using Civil Remedies to Achieve Criminal Law Objectives*, 42 HASTINGS L.J. 1325 (1991); 1994 Symposium: What Price Civil Forfeiture? Constitutional Implications and Reform Initiatives, Mary M. Cheh, *Can Something This Easy, Quick and Profitable Also be Fair? Runaway Civil Forfeiture Stumbles on the Constitution*, 39 NEW YORK L.SCH.L.R. 1; George Fishman, *Civil Asset Forfeiture Reform: The Agenda Before Congress*, 39 NEW YORK L.S.L.R. 121 (1994); Steven L. Kessler, *For Want of a Nail: Forfeiture and the Bill of Rights*, 39 NEW YORK L.SCH.L.R. 205 (1994); Anthony J. Franze, *Casualties of War?: Drugs, Civil Forfeiture and the Plight of the Innocent Owner*, 70 NOTRE DAME L.REV. 369 (1994); Gordon, *Prosecutors Who Seize Too Much and the Theories They Love: Money Laundering, Facilitation, and Forfeiture*, 44 DUKE L.J. 744 (1995); Bullock, *Filling the Coffers With Civil Forfeitures*, LEGAL TIMES, November 1, 1993; Brazil & Berry, *Tainted Cash or Easy Money?*, ORLANDO SENTINEL TRIBUNE, June 14-15, 1992; Schneider & Flaherty, *Presumed Guilty: The Law's Victims in the War on Drugs*, PITTSBURGH PRESS, August 11-September 6, 1991.

when that proceeding occurs while the possibility of a criminal prosecution based upon the same violation looms. Indeed, *even standing alone*, civil forfeiture proceedings have long been recognized as among the most oppressive actions that can be brought by the government. As was written over two hundred years ago by pundits of the day

> In all actions for penalties, forfeitures and public debts, as well as many others, the government is a party and the whole weight of government is thrown into the scale of the prosecution [,] yet these are all of them civil causes. -- These penalties, forfeitures and demands of public debts may be multiplied at the will and the pleasure of the government. -- These modes of harassing the subject perhaps been

> more effectual than direct criminal prosecutions. -- Yet in the reign of Henry the Seventh of England, Empson and Dudley acquired an infamous immortality by these prosecutions for penalties and forfeitures. -- Yet all of these prosecutions were in the form of civil actions; they are undoubtedly objects highly alluring to a government. -- They fill the public coffers and enable the government to employ its minions at a cheap rate. They are a profitable kind of revenge.

Essays of an Old Whig, *Philadelphia Independent Gazetteer*, October, 1787 -- February, 1788 in 3 THE ANTI-FEDERALIST PAPERS, Section 3.16.[17] *See also,* The Honorable George C. Pratt & William B. Peterson, *Civil Forfeiture in the Second Circuit,* 65 ST. JOHN'S L. REV. 653 (1991); *United States v. All Assets of Statewide Auto Parts, Inc., etc.*, 971 F.2d 896, 905 (2nd Cir. 1992) ("[w]e continue to be enormously troubled by the government's increasing and virtually unchecked use of the civil forfeiture statutes and the disregard for due process that is buried in those statutes.").

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[17] The Anti-Federalists based their campaign on ideas such as this. Indeed, it was to overcome such objections that the Bill of Rights was added. The debate as to whether to adopt the Bill of Rights was not over whether such rights existed or were important, but that the existence of such a list could be interpreted as excluding everything not specifically set forth therein, thereby inadvertently allowing rights to be trampled on.

> It has been objected also against a bill of rights, that, by enumerating particular exceptions to the grant of power, it would disparage those rights which were not placed in that enumeration; and it might follow, by implication, that those rights not singled out were intended to be assigned into the hands of the General Government, and were consequently insecure.

Schwarz, THE BILL OF RIGHTS, Vol. II at 1031 (Speech by Madison on June 8, 1789 in presenting proposed Bill of Rights to Congress).

This Court in *Green v. United States*, *supra*, observed that the Double Jeopardy Clause reflected the principle that the government, with all its resources and power, should not be allowed to make repeated attempts to punish an individual for an alleged offense, thereby subjecting him "to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity . . ." 355 U.S. at 187-88. Similarly, the Court in *North Carolina v. Pearce*, *supra*, held that the theory of double jeopardy is that a person should not be required to run the gauntlet more than once. 395 U.S. at 727. Yet, this is precisely what occurs when one is subjected to separate proceedings involving civil forfeiture and criminal prosecution.[18] Respondents were no less oppressed by the additional embarrassment, expense, ordeal, and anxiety because the forfeiture proceedings were civil rather than criminal; and they were forced to "run the gauntlet" more than once.

For double jeopardy purposes, the order in which the proceedings take place simply does not matter. A civil forfei-

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[18] For example, in a recent case in the Southern District of Florida, after convicting CenTrust CEO David Paul for various criminal violations arising out of the mismanagement of CenTrust Savings Bank, the government initiated a civil proceeding based on the same conduct. The criminal proceeding exhausted the defendant's resources, and during the criminal case he suffered near fatal heart problems. Because he has no more resources with which to hire counsel in the civil proceeding, he is forced to represent himself, with all the attendant disadvantages, and is laboring under the additional burden of having to conduct this defense from a prison cell. *See* Doris, *David Paul's CenTrust Saga Continues,* DAILY BUS. REV. (Mon., Feb. 12, 1996) ("Now he describes himself as 'indigent' and 'broke,' a lone David who has a law degree but who never practiced, fending off a goliath of a government team comprising more than a half dozen lawyers.").

ture proceeding following a criminal prosecution for the same violation, and vice versa, will trigger the double jeopardy bar. As the Ninth Circuit observed below (where the civil forfeiture followed the criminal prosecution after having been stayed during the pendency of the prosecution), "such a coordinated, manipulative prosecution strategy heightens, rather than diminishes, the concern that the government is forcing the individual to 'run the gantlet' more than once." 33 F.3d at 1217. Similarly, in another recent case where the forfeiture proceeding followed a criminal prosecution, the Tenth Circuit observed, "[t]he practice of instituting multiple proceedings against a single defendant, which the government benignly terms a 'coordinated law-enforcement effort,' has as much or more capacity to harass and exhaust the defendant than does a post hoc decision to retry him." *United States v. 9844 South Titan Court*, *supra*, 1996 WL 49002 at *14 (citations omitted).

Commenting on situations where the civil forfeiture action and the criminal prosecution are ongoing at the *same* time (in separate proceedings), Professor Cox observes:

> The harassment of multiple government prosecutions which seek punishment hardly disappears when both are going on at the same time. The defendant is as effectively, perhaps more effectively, whipsawed by the government's simultaneous two-bites-at-the apple approach as by a wait-and-see second attempt to prosecute. Simultaneous dual prosecutions involving different burdens of proof and different factfinders present a real threat of dual punishment, rather than only a hypothetical threat that the government might seek more in a second proceeding. As the Ninth Circuit correctly concluded, the government *exacerbates* rather than obviates double jeopardy concerns when it tries to team up on the defendant in this way.

S. Cox, *Halper's Continuing Double Jeopardy Implications*, *supra*, at 1300 and n.193.

However, for the individual (such as Respondent Ursery) against whom the government first launches a civil forfeiture action while contemplating and investigating a criminal case, the oppression and opportunity for abuse is at its worst. In this situation, where the potential for criminal charges exists, not only is the defendant subjected to all of the evils of two proceedings condemned in *Green* and *Pearce*, but the possibility of a criminal prosecution forces a number of additional unpalatable choices. Indeed, this is where the "coordination" of two proceedings emerges as the most pernicious vice.

Discussing the advantages of civil forfeiture proceedings over criminal forfeitures, the U.S. Department of Justice, Office of Justice Programs, Bureau of Justice Assistance training manual No. 1, CIVIL FORFEITURE: TRACING THE PROCEEDS OF NARCOTICS TRAFFICKING, encourages broader and more aggressive use of the civil forfeiture statutes not only because of its advantage with respect to the standard and burden of proof, but also because

> The claimant may be deposed and disclosure of his records compelled. . .And, while the Fifth Amendment may still be asserted, *a civil claimant risks an adverse factual finding by doing so. This possibility places the claimant in a particular bind if criminal charges against him are still pending. Asserting the Fifth Amendment may result in an adverse factual determination, while answering question may have incriminating consequences in the criminal proceedings.*

* * *

> For these reasons, *the civil claimant is in a very difficult position relative to his posture in a criminal trial.* . . . This means that, even when tracing obstacles exist, forfeiture proceedings should be considered *since the government may never be put to its proof.*

U.S. Department of Justice, Asset Forfeiture training manual No. 1, November 1988, Addendum Added January 1992, "The Advantages of Civil Forfeiture," at 2 (emphasis supplied).

Several cases have held that the fact than an individual makes a claim to property in a forfeiture proceeding *is* admissible in a criminal case, and is not shielded by any Fifth Amendment privilege. *Baker v. United States*, 722 F.2d 517, 518-19 (9th Cir. 1983) (implying that there is no Fifth Amendment privilege shielding the filing of a claim for property that the government seizes for forfeiture, characterizing the Fifth Amendment claim as weak, and finding no constitutional impediment to the requirement that claimant incriminate himself to claim ownership of forfeitable property); *United States v. Fifteen Thousand Five Hundred Dollars ($15,500) in U.S. Currency*, 558 F.2d 1359, 1360-61 (9th Cir. 1977) (similar). *See*, D. Smith, PROSECUTION AND DEFENSE OF FORFEITURE CASES, Matthew Bender (1995), &10.03, 10-39 to 10-41; Note, *Constitutional Rights in Civil Forfeiture Actions*, 88 COLUM. L. REV. 390.

> If a property owner wants an opportunity to regain his property, he must first demonstrate an interest in the property sufficient to establish standing. However, by alleging an interest in the property, a claimant may also provide information that can be used against him by the state in a later criminal trial.

> A claimant may preserve his Fifth Amendment right only by not coming forward and alleging an interest in the property, resulting in the automatic forfeiture of the property.

Id. at 396-97.[19] *But see*, *United States v. Cretacci*, 62 F.3d 307, 311 (9th Cir. 1995), *petition for cert. pending* (holding that "a defendant's claim of ownership of property that was subject to forfeiture may not be used [to incriminate the defendant in a criminal case]," relying on *United States v. Simmons*, 390 U.S. 377, 394, 19 L.Ed.2d 1247, 88 S.Ct. 967 (1968)).

In addition to the obvious Fifth Amendment problems created by the government's "coordination" of separate civil forfeiture and criminal prosecutions, the government can, and often does, pauperize a person by seizing all of his or her assets, thereby preventing the person from retaining counsel in *either* the criminal prosecution or the civil forfeiture proceeding. Similarly, coordination of separate proceedings increases the risk that grand jury evidence will be used to bolster the civil case, that communication between prosecutors in the civil and criminal cases will ensure that various actions in each case will be timed so as to have the most

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[19] The property owner's predicament has always exceeded that facing other civil litigants who faced the possibility of a subsequent criminal prosecution, because the claimant in most federal forfeiture proceedings has the burden of proof to show why his property is not subject to forfeiture. *See, e.g.*, 21 U.S.C. §881(d) (incorporating burden of proof provisions of 19 U.S.C. §1615). However, with the threat of a criminal indictment, the government can inhibit a claimant's ability to defend the forfeiture by inhibiting his or her ability to testify. *See, e.g., United States v. United States Currency*, 626 F.2d 11, 14-15 (6th Cir. 1980). Because of the burden of proof the Claimant's Fifth Amendment right to remain silent is effectively purchased at the cost of his property. Thus civil forfeiture can be used to extort forfeitures of property that would probably not occur were the proceedings brought in reverse order.

coercive and oppressive effect, and that discovery will be obtained for the civil case through grand jury subpoena or search warrants obtained in the criminal case. See, Robert G. McCampbell, *Parallel Civil and Criminal Proceedings: Six Legal Pitfalls,* 31 CRIM. LAW BULL. 483 (1996). All of these actions upset the fundamental notions of fairness with which the Framers were concerned in constructing a Bill of Rights.

V. THE DECISIONS BELOW PROMOTE THE TWIN GOALS OF FAIRNESS AND JUDICIAL EFFICIENCY.

Although the government and amici supporting the government's position express apprehension about the effect of the decisions below, those concerns are greatly exaggerated. By requiring the government to seek imprisonment, fines and forfeitures in one proceeding, the decisions will promote both fairness and judicial efficiency. The government already has this ability in most cases through the use of criminal forfeiture statutes such as 18 U.S.C. §982 and 21 U.S.C. §853, which include forfeiture provisions for a wide array of criminal offenses.[20] The government has already adapted to these decisions with a minimum of difficulty. Indeed, as one district court recently observed "[t]he single-proceeding approach is now followed in this district and elsewhere . . ." *United States v. McCaslin,* 863 F.Supp. 1299, 1307 (W.D.Wash. 1994). Prosecutors are also now routinely requiring express waivers of double jeopardy rights in plea agreements. Counsel have also been advised that the Department of Justice is seeking legislation specifically

[20] The fact that not all states have similar criminal forfeiture statutes cannot justify dispensing with this deep-rooted constitutional protection. Rather, the solution is for the state legislatures to enact criminal forfeiture provisions.

authorizing civil forfeiture cases to be joined for trial with related criminal prosecutions.[21]

To the extent that *Austin, Kurth Ranch,* and the decisions below require prosecutors to pursue criminal forfeitures as part of a single prosecution instead of relying upon separate civil forfeiture proceedings, this development will strongly promote fairness as well as judicial economy. The tactical advantages enjoyed by prosecutors in civil forfeiture proceedings have been well documented. *See, e.g.,* note 16, *supra. See also,* 1 D. Smith, PROSECUTION AND DEFENSE OF FORFEITURE CASES, ¶ 12.10[2], 12-150 (1995):

> Prosecutors enjoy tremendous procedural advantages in civil forfeiture cases. They frequently win because of procedural defaults by claimants or simply because the claimant's funds to pay counsel are soon exhausted -- assuming that the claimant has the financial wherewithal to retain counsel at all. Few civil forfeiture cases ever proceed to trial as a result of these legal and practical obstacles. In a criminal forfeiture case, by contrast, there is a constitutional right to court-appointed counsel for indigent defendants and every case must be decided by a jury after a trial on the merits unless the defendant chooses to waive his or her right to a jury verdict on the forfeiture allegations.

[21] Such combined proceedings have been used even in the absence of explicit statutory authority. *See, e.g., United States v. One 1976 Mercedes Benz 280 S,* 618 F.2d 453, 468 (7th Cir. 1980); *United States v. Young,* 426 F.2d 93 (6th Cir.), *cert. denied,* 400 U.S. 828 (1970); *United States v. Real Property,* 816 F.Supp. 1077, 1085 (E.D.Va. 1993). The government is using combined proceedings now in gambling cases under 18 U.S.C. §1955--belying its contention that such a hybrid proceeding is not possible.

Criminal forfeitures are not only more fair -- they are also more efficient than bringing separate civil proceedings. The Department of Justice has been urging prosecutors to make greater use of criminal forfeiture statutes for years, not because of concern about double jeopardy problems, but simply to promote the efficient use of limited prosecutorial and judicial resources. *See, e.g.*, "*Need for Increased Emphasis on Criminal Forfeiture*," Memorandum from George J. Terwilliger, Principal Deputy Associate Attorney General, to U.S. Attorneys (April 22, 1991); Gary M. Maveal, *The Unemployed Criminal Alternative in the Civil War of Drug Forfeitures*, 30 AM.CRIM.L.REV. 35 (1992). Congress recognized that unitary proceedings are more efficient when it greatly expanded the scope of the criminal forfeiture statutes in 1984. S. Rep. No. 225, 98th Cong., 2d Sess. 210, reprinted in 1984 U.S. Code Cong. & Admin. News 3182, 3393 ("[i]t is a waste of valuable judicial and prosecutive resources to require separate civil forfeiture proceedings"). Thus, the decisions of the Sixth and Ninth Circuits encourage the government to follow a policy preference long promoted by the Department of Justice and Congress.

CONCLUSION

The judgment of the Court of Appeals for the Sixth Circuit in No. 95-345, and the judgment of the Court of Appeals for the Ninth Circuit in No. 95-346, should be affirmed.

Respectfully Submitted,

RICHARD J. TROBERMAN*
1301 Fifth Avenue, Suite 3500
Seattle, WA 98101-2650
(206) 343-1111

DAVID B. SMITH
526 King Street, Suite 213
Alexandria, VA 22314-3163
(703) 548-8911

PROFESSOR BROOKS R. FUDENBERG
University of Miami Law School
Coral Gables, FL 33124-4662
(305) 284-4262

TAMARA R. PIETY
100 N.E. 3rd Avenue, Suite 900
Fort Lauderdale, FL 33301
(305) 523-0400

*Counsel of Record

March 22, 1996